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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945

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No. 1158

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GEORGE A. EARNHARDT,  
*Petitioner,*

*vs.*

UNITED STATES OF AMERICA.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE  
SEVENTH CIRCUIT.

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REPLY TO MEMORANDUM FOR THE  
UNITED STATES.



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Comes now George A. Earnhardt, petitioner, for Writ of Certiorari herein and for a reply to memorandum filed on behalf of the United States by J. Howard McGrath, Solicitor General of the United States in the above cause wherein it is contended that the Petition for Writ of Certiorari filed herein should be denied for want of jurisdiction, this petitioner says:

1. The Solicitor General relies upon the Rules of Criminal Procedure for the District Courts of the United States, effective March 21, 1946. It is contended first that these

rules do not govern this proceeding. Rule 59 of the recently effective Rules states that "they govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending." These proceedings were pending prior to the effective date of the rules in question, therefore the Solicitor General must rely upon the issue as to whether it is "just and practicable" to make such application of the rule as he contends for. These new rules in their final form were not even published by the national law book companies until their April issue. This petitioner has contended that he has been convicted and deprived of his liberty unjustly and unfairly by the arbitrary action of the District Court. Certainly, it could not be said that to perpetuate that injustice by technical application of a rule which obviously it is in the discretion of this court to apply or not, would be "just and practicable." The rules of the Supreme Court which were generally available to the bar when the petition was prepared, under Rule 13 thereof provided:

"For the purpose of computing time as specified in the foregoing rules, Sundays and legal holidays (whether under Federal law or under the law of the State where the case was brought) shall be excluded."

2. This petitioner respectfully suggests to the court that under Rule 37 of the Rules as they now stand, this court is not without jurisdiction to entertain the Petition for Certiorari. Rule 37 covers Taking of Appeal under Rule 37(a) and under 37(b) thereof it covers Petition for Review on Writ of Certiorari, and therein provides under 37(b) (2) for the 30 day period after entry of judgment which is relied upon by the Solicitor General in his Memorandum. Rule 45 of the new rules cited by the Solicitor General referring to enlargement of time provides under sub-paragraph (b) sub-division (2) thereof that the court

may "upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect"; but further prohibits such enlargement of time for the period for taking an "appeal." This rule does not prohibit enlargement of time for filing a Petition for Certiorari. Hence, it is now within the discretion of this court to enlarge the time for filing this Petition if it be determined that the new rules are to be applied to this case.

Petitioner says that the Petition in this case was filed by the printer acting as the agent of the petitioner and his counsel, that the printer was furnished the dates applicable, that petitioner's counsel had instructed the printer to prepare and file this petition by April 20, 1946, but that there was a delay in the printing of same due to no fault of this petitioner or his counsel, and that the petition was filed within the time allowed by the rule which the petitioner's counsel conceived to be applicable to this pending case, and that at most the delay of one day beyond the period claimed by the Solicitor General as being determinative was due to neglect of the petitioner and his counsel to ascertain and determine that the new rules were applicable to this case and to avoid the aforesaid printing delay, and accordingly have the petition filed within the 30 day period without excluding Sundays or holidays.

It is respectfully submitted that the court could and should properly determine that this is "excusable neglect." The petitioner in good faith has used every effort to file his Petition promptly before this court and in the event that the court shall determine that the case falls within the new rules, this petitioner then moves the court in the alternative to enlarge the period to permit the filing to be done after the expiration of the specified period as is

provided by the above rule No. 45(b) (2) within the discretion of this court.

Finally, this petitioner urges the court that his cause should not fail by reason of a misunderstanding of the applicability of this rule in a period of transition from one set of rules to another, in which it is justifiable that litigants and their counsel might not fairly construe the applicability of one or the other set of rules; and petitioner respectfully submits that in the cause of justice this court should be moved to examine his petition to determine whether a Writ of Certiorari should issue without such petition being barred by pure technicality not touching the merits thereof.

Respectfully submitted,

WALTER E. WILES and

WALTER W. DUFT,

*Attorneys for Petitioner.*

